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IN THE

Supreme Court of the United States

October Term, 1988

GENE MYERS, Guardian Ad Litem, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*,

CARLTON JAMES LEWIS, *Petitioner*,

v.

SHAWN KATHLEEN LEWIS, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S JOINT REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners Gene Myers and Carlton James Lewis submit this Joint Reply, pursuant to Sp. Ct. R. 22.5, to arguments first raised in Respondent's Brief in Opposition to petitions for certiorari numbered 88-555 and 88-683.

Respondent's Brief in Opposition is flawed in its approach to appellate practice before this Court. Three fundamental flaws underly her Brief: (1) that issues not raised below may now be raised, (2) that this Court will disregard the factual findings of

the trial court against the Respondent below, based on allegations outside the record, and (3) that independent state grounds may be asserted where the lower court did not employ them. Further errors flow from this attempted misuse of the appellate process. These are aggravated by use of the wrong constitutional analysis.[1]

To deny the petitions for certiorari herein, based upon Respondent's efforts to blur the clear-cut issues and factual findings, would reward such practices and encourage their use. In reality, the issues herein are very simple and their importance favors the granting of both petitions.

I. RESPONDENT'S BRIEF IS PREMISED UPON THREE FUNDAMENTAL ERRORS CONCERNING THE NATURE OF APPELLATE PRACTICE.

A. RESPONDENT MAY NOT RAISE ISSUES BEFORE THIS COURT NOT RAISED IN THE MICHIGAN COURT OF APPEALS.

Respondent believes she may raise issues before this Court which were neither raised nor passed upon by the Michigan Court of Appeals. She does this by seeking to challenge the facts found by the trial court, by arguing standing under state statutes, and by asserting independent state grounds for the decision.

The Michigan Court of Appeals held simply that the injunction at issue was to be "dissolved, because it interfere[d] with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." Myers' Appendix at 3a (citations omitted).

The issue framed by this holding is simple: whether *Roe* and *Danforth* precluded the action of the trial court, under the facts

[1] Respondent further tries to persuade this Court by waging a war of words. Respondent's repeated use of such terms as "entirely frivolous," "absurd," "complete distortion," and "grossly misrepresents" adds heat but little light to the analysis. *See, e.g.*, Respondent's Brief at 10, 11, 12, 13, 18, 26.

as found by that court. No challenge to the facts found by the trial court was considered. No question of standing under state law was discussed. No independent state grounds were mentioned. These issues are not properly before this Court.

B. RESPONDENT MAY NOT ASSERT ALLEGATIONS OUTSIDE THE RECORD TO OVERTURN FACTUAL FINDINGS OF THE TRIAL COURT BELOW.

In this case, although no challenge was made in the lower courts to the sufficiency of the evidence to support the findings and judgment of the trial court, and although the Michigan Court of Appeals did not consider that issue (but relied wholly on federal constitutional law), the Respondent now seeks to challenge the findings of the trial court. Brief in Opposition at 3-16. Moreover, Respondent seeks a consideration of allegations beyond the record of this case. Thereby, Respondent asks this Court to sit as a trial court, weighing competing assertions of new evidence.

The trial court found, in its Statement of Facts, that "it was determined that in fact there was no such medical documentation [of the medical need for an abortion, as asserted by Respondent] and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Myers' Appendix at 8a. The clear implication of this finding is that her attending physician determined that there was no medical indication for the abortion sought.

Respondent now wants to avoid this finding by filing affidavits in this court. She alleges that Dr. Stoker was not really Respondent's physician and that he really did say that she had medical indications for an abortion. Such an effort to counter the findings of a trial court with allegations outside the record (and, therefore, not subject to the usual requirements of evidence, such as a proper foundation and cross-examination of witnesses, with affidavits in the United States Supreme Court is improper. By failing to raise her challenge to the factual

findings of the trial court by specifying it as an issue on appeal before the Michigan Court of Appeals, Respondent has waived this issue.

Moreover, where the facts of a case are properly before this Court, it will only reconsider the state court's findings of facts in a limited set of circumstances. *See, e.g.*, Stern, Gressman & Shapiro, *Supreme Court Practice* 185-87 (6th ed. 1986) (listing the situations in which this Court has examined the facts of a case). This set of circumstances may be distilled into two major exceptions to the rule that "[t]he Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. And once a case is otherwise before it, the Court generally will not reexamine the state court's findings and conclusions of fact." *Id.* at 185 (citing, *inter alia*, *Grayson v. Harris*, 267 U.S. 352, 358 (1925)).

First, this Court will review a state court's findings "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it." *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). In the present case, there is evidence to support the finding of fact of the trial court.

Second, this Court will review state court findings of fact "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on the Federal question, to analyze the facts." *Id.* While this second exception may apply in the instant case, it is clear that analysis of the facts legitimately in evidence supports the issuance of the injunction by the trial court, if *Roe* does not preclude such action. Thus, the true issue is one of constitutional law and not one of fact.

While this Court has the freedom to make an independent determination of the facts, *Creswill v. Knights of Pythias*, 225 U.S. 246, 262 (1912), Respondent seeks to have this Court deny the petitions for certiorari herein on the basis of a *de novo* hearing on allegations outside the record. Because a *de novo* hearing is beyond anything approved by this Court, the

request for it serves as no basis on which to deny the writs sought herein.

C. RESPONDENT MAY NOT ASSERT INDEPENDENT STATE GROUNDS NOT RELIED UPON IN THE LOWER APPELLATE COURTS BY CLAIMING THAT THE STATE HAS NOT RECOGNIZED AN INTEREST IN UNBORN HUMAN LIFE AND THAT PETITIONER MYERS HAS NO STANDING UNDER STATE LAW.

Respondent declares that the State of Michigan has not asserted its interest in unborn human life. Brief in Opposition at 23-26.[2] This argument fails the test of logic. If, indeed, there is state action herein, as the Respondent insists, then the state must have acted through the trial court. The notion that the trial court cannot base its decision on a state interest recognized in Michigan law,[3] but that the state of Michigan must assert that interest by statute or by acting as a party, is erroneous. Michigan law has recognized an interest in protecting fetal life by statute and prior court opinion, upon which the trial court could base its opinion.[4] Finally, whether Michigan has recognized an interest in protecting fetal and paternal rights is a matter of state law, which, if unclear, should be decided by the state courts on remand, after this Court corrects the error of law that *Roe* and its progeny preclude the action of the trial court herein. *Cf. Merchant's National Bank v. Richmond*, 256 U.S. 635, 638 (1921) (Court corrected the

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[2] In addition to the flaws noted *infra*, this issue was not timely raised in the court of appeals and is, therefore, waived on appeal.

[3] *See* Myers Petition at 14-15 for the clear statement of Michigan public policy on abortion by the Michigan Supreme Court, which declared it the public policy of Michigan to oppose abortion except to save the life of the mother.

[4] *Id.* Moreover, the referendum to overrule the legislature and allow public funding of abortion in Michigan, upon which Respondent relies to cast doubt on the public policy of Michigan, Brief in Opposition at 26 & n.17, was resoundingly defeated in the election of November 8, 1988. Michigan forcefully rejected public funding of abortion.

error of constitutional law but left open a question of fact to be decided by the state court on remand).

Likewise, whether Petitioner Myers has standing under the Michigan guardian ad litem statute is a matter of state law, not relied upon by the Michigan Court of Appeals in striking down the injunction of the trial court. Brief in Opposition at 1 & n. 1.

II. RESPONDENT EMPLOYS A FLAWED CONSTITUTIONAL ANALYSIS.

Respondent argues that "Petitioners' failure to assert a compelling state interest is fatal because a compelling interest is essential to justify any state interference with Ms. Lewis' abortion decision." Brief in Opposition at 16. Respondent misunderstands the argument. Petitioners argue that this Court has never recognized a fundamental right to a non-medically indicated abortion. Because the trial court found that there is no medical indication for the abortion sought herein, there is no fundamental right. Therefore, no compelling state interest need be shown.

Further, Respondent would make of the abortion right an absolute right of a woman to "control her body." *Id.* at 12. This radical autonomy model of the abortion liberty clouds Respondent's perception of the analysis herein, but it was expressly rejected by this Court in *Roe*. 410 U.S. at 154. This Court also expressly rejected abortion on demand, the corollary of such a model. *Doe v. Bolton*, 410 U.S. 179, 189 (1973). Thus, Respondent's representation of the abortion liberty as an absolute right, excluding the consideration of all competing interests, is erroneous.

Nor did *Roe* forever eliminate the standing of guardians ad litem representing the interests of unborn children. Respondent attempts a sleight of hand by claiming that the Guardian Ad Litem herein is asserting the "right to life" of Unborn Child Lewis, and, therefore, he has no standing, because Unborn Child Lewis is not a "person" within the meaning of the Fourteenth Amendment. Brief in Opposition at 1-3. This error also flows from a misunderstanding of the analysis.

Petitioner Myers is not asserting the "right to life" of Unborn Child Lewis. Therefore, Respondent's discussion of personhood is superfluous. Rather, Petitioners defend the action of the Michigan trial court on the basis that it had a legitimate, constitutionally permissible state purpose in protecting fetal life and in encouraging childbirth over abortion — derivable from, *inter alia*, its parens patriae power and its institutional self-interest, not the Fourteenth Amendment — to which the trial court's action of enjoining a non-medically indicated abortion was rationally related. Because the interests in fetal life find their source in places other than the Fourteenth Amendment, what the Court has held concerning the personhood of Unborn Child Lewis under the Fourteenth Amendment is wholly irrelevant.[5]

Respondent also argues that an abortion is always medically indicated because "abortion, particularly early abortion, is safer than continued pregnancy and child birth." Brief in Opposition at 13 & n.8. Respondent argues that this is "always" so "in the first trimester," because "*Roe* implicitly recognized" that abortion was always safer in the first trimester than carrying the unborn child to term. *Id.*

While initially appealing, this argument is erroneous. First, it makes this Court's discussions of medical judgment and medical necessity irrelevant surplusage. *See* Myers' Petition at 8-12 (citing numerous references by this Court to a requirement of medical necessity for the well-being of the mother, including appropriate sanctions for physicians who violated that standard). Finally, as noted above, this Court has rejected

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[5] Likewise, as Petitioners defend state action that has already occurred, based on a satisfaction of the rational basis test, the assertion that a woman can obtain an abortion without state action and, thus, there can be no federal remedy, is irrelevant as well. Brief in Opposition at 18. This flawed analysis flows from a fundamental misunderstanding of the theory by Respondent. While state action might be required for Petitioners to assert a Fourteenth Amendment *right* to a consideration of their interest, it is not required where they, as here, assert that the state had a rational basis for pursuing the protection of their interests by injunction — a legitimate, constitutionally permissible purpose.

abortion on demand, even in the first trimester. If there were always medical indications for an abortion, as alleged by Respondent, then this Court would have approved abortion on demand.

In sum, the Respondent has misunderstood the analysis employed by this Court in the abortion cases. As the analysis of Respondent is flawed, it serves as no basis to deny the petitions for certiorari sought herein.

CONCLUSION

The issue herein is simple: whether *Roe* and *Danforth* precluded the trial court from issuing an injunction to protect fetal and paternal interests where the attending physician has found that there is no medical indication for the abortion sought. In simpler terms, it is whether this Court recognizes abortion on demand.

Respondent seeks to change the case by attempting to overturn factual findings of the trial court by asserting new allegations of fact on appeal. If she was dissatisfied with the statement of Dr. Stoker, it was her duty in the trial court to find another physician. If she believed Dr. Stoker was the wrong physician, it was her duty in the trial court to bring in the right one, or, at least, submit her evidence of the error to the fact finder. If she believed the fact finder was in error as to those facts, it was her duty to appeal those claimed factual errors to the Michigan Court of Appeals. Instead, she proceeded with her federal question, accepting the findings of the trial court.

Respondent won on her federal question. The Michigan Court of Appeals decided the appeal solely on the basis of the federal question.

Now Respondent seeks to muddy the crystal clarity of this case by asking this Court to relitigate the facts and by raising issues not passed upon below. Affidavits alleging factual errors on appeal to this Court cannot defeat the factual finding of a trial court. This Court should reject such practices and not encourage them by denying certiorari on such a basis.

This Court needs only to correct the misreading of *Roe* and *Danforth* by the Michigan Court of Appeals, which found those cases to countenance abortion on demand, even where the only evidence in this case is that the woman's physician has decided that the abortion sought is for purely non-medical reasons, and where the finder of fact has so found, even employing the broad definition of health in *Bolton*. All other matters of which Respondent complains have either been waived or should be resolved by the Michigan courts. This Court should take this case to clarify the plain misunderstanding of its holdings in two cases critical to a matter of great public importance, the regulation of abortion. The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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